I accordingly adjudge as follows:

(a) the deposit of $49,000 be forfeited in favour of Siland;
(b) the learned senior assistant registrar's certificate of sale be annulled;
(c) the registration of the title to the land in the name of Frozen Food be cancelled and the issue document of title thereto be returned to the senior assistant registrar;
(d) the land be resold;
(e) there be liberty to apply;
(f) the defendants do pay the first plaintiff's costs of the action to be taxed.

*Application allowed.*

Solicitors: *Guna & Co; Arthur Lee, Yap & Netto; KC Yap Kamaludin & Partners.*

Reported by *Yap Shao Sin*

## Ley Boon Hee v Paling Construction Sdn Bhd

HIGH COURT (BORNEO) — SUIT NO KG 606 OF 1986
HAIDAR J
2 FEBRUARY 1990

*Civil Procedure — Defence and counterclaim — Application for striking out — Failure of defendants to comply with court order — Whether plaintiff thereby prejudiced — Rules of the High Court 1980, O 24 r 16(1)*

The plaintiff filed a summons-in-chambers under O 24 r 16(1) of the Rules of the High Court 1980 ('RHC') against the defendant for an order, inter alia, that the defence and counterclaim be struck out and judgment entered in favour of the plaintiff. The plaintiff contended that the defendant had failed to comply with the court order pursuant to summons for directions in that the defendant did not within 60 days serve on the plaintiff a list of documents and file an affidavit verifying such list and thus the plaintiff had been prejudiced. The defendant's counsel filed the list of documents and the affidavit verifying such list on 13 January 1990 (expiry of the 60 days being on 15 January 1989) but they could not be served on the plaintiff's advocates on 13 January 1990 itself, as it was a Saturday and the latter's office does not work on a Saturday. It remained unserved at the date of the hearing of the present summons on 15 January 1990.

**Held**, making an 'unless' order:

(1) Order 24 r 16(1) of the RHC clearly gives power to the court in such an application to order that the defence be struck out and judgment be entered accordingly unless the party complies with the rule or order for discovery by a stated hour of a stated day. However, such power is a discretionary one and it has to be exercised cautiously and with due regard to maintaining the principle that orders were made to be complied with.

(2) The issue of delay per se does not by itself necessarily mean that the court should grant the order prayed for in this summons by the plaintiff merely on the ground of non-compliance with the procedural steps laid down under RHC as the merits of the case is a material consideration.

(3) The proper course is for the plaintiff to apply for an 'unless' order which the defendant is asking for in this case from the court.

(4) As the defendant had filed the list of documents and the affidavit verifying the list of documents, though not served on the plaintiff yet, the object of the plaintiff has in fact been achieved because the summons has produced what they wanted, viz that the due process of the action should go forward.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-91 of 1990.]

**Cases referred to**

1 *Samuels* v *Linzi Dresses Ltd* [1980] 1 All ER 803 (refd)
2 *Husband's of Marchwood Ltd* v *Drummon Walker Developments Ltd* [1975] 2 All ER 30 (folld)
3 *Fira Development Sdn Bhd* v *Goldwin Sdn Bhd* [1989] 1 MLJ 40 (refd)

**Legislation referred to**

Rules of the High Court 1980 O 24 r 16(1)

*Cheng Ling (Miss)* for the plaintiff.
*HC Sim* for the defendant.

*Cur Adv Vult*

**Haidar J**: Ley Boon Hee ('LBH'), the plaintiff, filed a summons-in-chambers dated 20 July 1989 under O 24 r 16(1) of the Rules of the High Court 1980 ('RHC') against the defendant, Paling Construction Sdn Bhd ('PCSB'), for an order that:

(i) the defence and counterclaim dated 9 January 1987 be struck out;
(ii) judgment be entered in favour of LBH for the sum of $461,957.37;
(iii) damages to be assessed by the Registrar of the High Court; and
(iv) costs to be taxed including the costs of and incidental to the summons (encl 47).

The grounds of the summons are:

(a) PCSB has failed to comply with item 2 of the court order dated 3 October 1988, that is, it did not comply within sixty (60) days from the date of service of the court order serve on LBH a list of documents and file an affidavit verifying such list;
(b) the delay is inordinate, inexcusable, and/or intentional and contumelious; and
(c) LBH has been irreparably prejudiced by the failure of PCSB to comply with the said item 2 of the court order, which cannot be compensated by costs.

It is supported by the affidavit of LBH himself.

Before proceeding to consider the summons, I think, it is appropriate that I set out the events of this case from the time it was filed in court in view of grounds (b) and (c) relied on by LBH.

LBH filed the writ on 17 November 1986 essentially for breach of contract entered into between both parties on 1 December 1984 whereby LBH acted as a sub-contractor for PCSB in respect of the construction of 'SMCB Kuching Luboil Blending Plant Project' and PCSB in turn was a sub-contractor for Messrs Tenaga Naja Sdn Bhd, the main contractors for the said project for Shell Marketing Co Borneo Ltd. Appearance was entered for PCSB on 2 December 1986. The defence and counterclaim was filed only on 9 January 1987 (encl 11), apparently with the consent of the then advocates for LBH (encl 9).

In the meantime, LBH filed a summons-in-chambers dated 6 December 1986 (encl 7) under O 14 r 1 and/or O 27 r 3 of RHC for judgment of $163,740.17, being part of the claims in the action on the ground that PCSB admitted to the said part of the claims. Affidavits were filed by both parties in respect of this summons (encl 7). When encl 7 came for hearing on 16 July 1988, it was dismissed with costs. According to counsel for PCSB, Mr HC Sim, who also appeared at the hearing of encl 7, it was dismissed at the request of LBH's counsel; apparently it was after an adjournment to check the accounts with LBH. Miss Cheng Ling, counsel for LBH did not dispute what was said by Mr HC Sim. Therefore, Mr HC Sim submitted that there are triable issues in this case.

On 20 July 1989, LBH then filed the present summons (encl 47) which I set out earlier on.

Pursuant to the summons for directions dated 3 October 1988, the court order dated 3 October 1988 (encl 37) was duly served on advocates for PCSB on 16 November 1988. The court order provides for the following events:

> *Under items (1) and (2)*: both parties shall, *within 60 days* serve on each other a list of documents and file an affidavit verifying such list.
>
> *Under item (3)*: there shall be inspection of documents *within 30 days after service of the lists of documents and filing of affidavits verifying such lists.*
>
> *Under item (4)*: the action shall be set down for trial *within 30 days after inspection of documents.*

The first event would trigger off the second and the second event the third.

On his part, LBH has duly complied with item (1) on 11 November 1988 (encl 43). Notification of setting down action for trial dated 3 November 1988 was filed in court on 9 November 1988. Miss Cheng Ling, counsel for LBH, submitted that even though LBH has complied with item (4), the action could only be set down for trial under item (4), *within 30 days after inspection of documents.* According to her, the period of 60 days under item (2) started to run from 16 November 1988 that is, the date of service of the court order and therefore, *expired on 15 January 1989.* It is not disputed that PCSB's counsel filed the list of documents and the affidavit verifying such list only on 13 January 1990 and they could not be served on LBH's advocates on 13 January 1990 itself, as it being a Saturday and LBH's advocate's office does not work on a Saturday. It remained unserved at the date of the hearing of the present summons on 15 January 1990.

I would like to add here that at the end of the submissions I realized that I had sometime in December 1989 made a receiving order and adjudicating order against LBH. An appeal was filed against my said order but there has been no application for an order of stay. Miss Cheng Ling, counsel for LBH, intimated that she knew of the order that I had made but was under the erroneous impression that LBH's status in the present summons was not affected by virtue of the appeal and therefore she did not inform me of LBH's status. I indicated to her that such erroneous impression is no excuse in which case the status of LBH is a primary issue even before I could hear this summons. However, subsequently on 22 January 1990, Miss Cheng Ling wrote a letter informing the court that LBH had been given the sanction by the Official Assignee under s 38(1) (a) of the Bankruptcy Act 1967. The letter dated 22 January 1990 from the Official Assignee to that effect was enclosed therein. As this case was filed before LBH was adjudged a bankrupt, the requirement of the '*previous* sanction' of the Official Assignee under s 38(1)(a) of the Bankruptcy Act 1967 strictly should not be an issue and suffice, in my view, that the sanction given by the Official Assignee enables LBH to continue with his action without any legal disability. In that event, the sanction resolved the status of LBH for the purpose of this case.

*The Law*

In her submission, Miss Cheng Ling said that LBH relies on both the inherent power of the court and the provisions of O 24 r 16(1) of RHC to strike out the defence and counterclaim and enter judgment accordingly. However, an examination of the present summons does not in any way indicate that LBH is relying on the inherent jurisdiction of the court but merely on O 24 r 16(1) of RHC. Be that as it may, O 24 r 16(1) reads:

> If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents ... fails to comply with ... that order ... then ... the court may make such order as it thinks just including, in particular, an order that ... the defence be struck out and judgment be entered accordingly.

Firstly, it is to be noted that LBH's counsel in her submission relied on authorities pertaining to dismissal of action for want of prosecution, *an action under O 25 r 1(4) of RHC* whereas the present summons is clearly taken out under O 24 r 16(1). However, she contended that the principles enunciated in respect of actions under O 25 r 1(4) should equally be applicable to a defaulting defendant under O 24 r 16(1) of RHC. As a result, her submission is centred on the principles and authorities in respect of O 25 r 1(4) and totally missed to submit on the relevant provision, that is, O 24 r 16(1) and the authorities, if any. With respect, she went on the wrong direction in her submission though of course she urged the court to consider the present summons of LBH by way of analogy.

Our O 24 r 16(1) is in pari materia with the English RSC O 24 r 16(1). Order 24 r 16(1) of RHC clearly gives power to the court in such an application to order that the defence be struck out and judgment be entered accordingly unless the party complies with the rule or order for discovery by a stated hour of a stated day (*Supreme Court Practice* (1985 Ed) at p 417, at 24/16/1). However, such power is a discretionary one and it has to be exercised cautiously and with due regard to maintaining the principle that orders were made to be complied with (see *Samuels* v *Linzi Dresses Ltd*[1]).

At the hearing of the present summons, PCSB had filed the list of documents and affidavit verifying the list of documents on 13 January 1990 though not served yet on LBH's advocates for the reason stated by me earlier. In this respect, the case of *Husband's of Marchwood Ltd* v *Drummond Walker Developments Ltd*,[2] in dealing with RSC O 24 r 16(1), would be of assistance. In the Court of Appeal, Russell LJ said at p 32:

> Supposing that at the hearing it had emerged that discovery was (so to speak) just round the corner, then it seems to me that the correct and only proper order the judge could have made would have been to say 'Order the defence to be struck out, and judgment for the plaintiffs on the claim if the lists for discovery are not produced in', say, two days, three days, seven days, some very short time.

Russell LJ went on further to say in the next paragraph as follows:

> The object of the plaintiffs has in fact been achieved, because their summons has produced what they wanted, namely, that the due processes of the action should go forward. I think that what should have been done in September 1974 was for the plaintiffs to ask for an order striking out the defence unless within a certain time the defendants had produced their discovery.

It is to be observed that even before the service of LBH's list of documents filed on 9 November 1988, LBH issued notification setting down the action for trial on 3 November 1988 and filed in court on 9 November 1988 (encls 39 and 40) implying therefore that the documents are plainly not that important. According to Mr HC Sim, counsel for PCSB, the documents are more or less the same and the parties knew of them at that time. In any event according to Mr HC Sim, there was no application for early trial by LBH and the occasion has not arisen for the case to be fixed for trial even if PCSB had complied with the order in respect of the discovery. I agree. In the circumstances, I do not see how LBH is thereby prejudiced.

The issue of delay per se does not by itself necessarily mean that the court should grant the order prayed for in this summons by LBH merely on the ground of non-compliance with the procedural steps laid down under RHC as the merits of the case is a material consideration (see *Fira Development Sdn Bhd* v *Goldwin Sdn Bhd*[3]). In this case, LBH withdrew the summons-in-chambers (encl 7) and implied therefore that there were triable issues in this case and in that event PCSB should not be shut out from defending the action.

In my view, the proper course is for LBH to apply for an 'unless' order. In any event PCSB is asking for an 'unless' order in this case from the court. In *Samuels* v *Linzi Dresses Ltd*,[1] the English Court of Appeal held that the court had jurisdiction even to extend time where an 'unless' order had been made and not complied with, citing RSC O 3 r 5(1) which is in pari materia with our O 3 r 5(1).

In this case, as PCSB had filed the list of documents and the affidavit verifying the list of documents though not served on LBH yet for the reason stated by me earlier, and in the words of Russell LJ in *Husband's of Marchwood*'s case,[2] 'the object of the plaintiffs has in fact been achieved because their summons has produced what they wanted, namely, that the due processes of the action should go forward'.

In the circumstances of the case, the proper order that I should make in this summons is an 'unless' order whereby PCSB is ordered to serve the list of documents and the affidavit verifying the list of documents on the LBH's advocates within three days from this order, failing which the defence be struck out and judgment entered accordingly. The proper order as to costs in respect of this summons should be costs in the cause.

*Order accordingly.*

Solicitors: *Matthew TK Chan & Co Advocates*; *Reddi & Co Advocates.*

Reported by *Kevin Mathews*